

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

In the Matter of)	
)	
Junk Fax Prevention Act of 2005)	CG Docket No. 05-338
)	
Rules and Regulations Implementing the)	CG Docket No. 02-278
Telephone Consumer Protection Act of 1991)	

**TCPA Plaintiffs' Comments on Petition for Retroactive Waiver
filed by Safemark Systems, LP**

Commenter, Gorss Motels, Inc., is the Plaintiff in a private TCPA action pending in federal district court in Florida against Petitioner Safemark Systems, LP (“Safemark”).¹ Petitioner seeks a “retroactive waiver” of 47 C.F.R. § 64.1200(a)(4)(iv), the rule requiring opt-out notice on fax advertisements sent with “prior express invitation or permission.”² The Consumer & Governmental Affairs Bureau sought comments on October 28, 2016.³

As argued below, the Commission should deny the Safemark Petition because (1) the Commission has no authority to “waive” a defendant’s statutory liability under 47 U.S.C. § 227(b)(3) for violations of the “regulations prescribed under” the TCPA; (2) the petition is untimely, where Safemark made no “effort” to file by April 30, 2015, as

¹ *Gorss Motels, Inc. v. Safemark Systems, LP*, No. 16-cv-1638 (M.D. Fla.) (filed Sept. 19, 2016).

² *Petition of Safemark Systems, LP for Retroactive Waiver*, CG Docket Nos. 02-278, 05-338 (filed Oct. 6, 2016) (“Safemark Petition”).

³ *Consumer & Governmental Affairs Bureau Seeks Comment on Petitions Concerning Commission’s Rule on Opt-out Notices on Fax Advertisements*, CG Docket Nos. 02-278, 05-338 (Oct. 28, 2016).

required by the October 30, 2014 Order; and (3) Safemark was “simply ignorant” of the law, given that its faxes contained *no* opt-out notice and Safemark claims the limited contact information on the fax was included solely because Safemark believed it was “good business practice.”

Procedural History

On October 30, 2014, the Commission issued its Order rejecting several challenges to the validity of § 64.1200(a)(4)(iv),⁴ but granting the covered petitioners “retroactive waivers.”⁵ The Commission allowed “similarly situated” parties to petition for waivers, but stressed that “in light of our confirmation here that a fax ad sent with the recipient’s prior express permission must include an opt-out notice, we expect that parties will make every effort to file within six months of the release of this Order.”⁶

On December 9, 2015, the Consumer & Governmental Affairs Bureau denied several petitions where the petitioner was simply “ignorant of the law,” and was not “confused” about whether opt-out notice was required on faxes sent with prior express invitation or permission, which is “independent grounds” to deny a waiver petition under

⁴ *In re Rules & Regulations Implementing the Tel. Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005; Application for Review filed by Anda, Inc.; Petitions for Declaratory Ruling, Waiver, and/or Rulemaking Regarding the Commission’s Opt-Out Requirement for Faxes Sent with the Recipient’s Prior Express Permission*, 29 FCC Rcd. 13998, 13998 (rel. Oct. 30, 2014) ¶¶ 19–20, 32 & n.70 (“October 30, 2014 Order”).

⁵ *Id.* ¶¶ 22–31.

⁶ *Id.* ¶ 2.

the October 30, 2014 Order.⁷ On November 2, 2016, the Bureau again denied several petitions on the basis that the petitioners appeared to be simply unaware of the rule.⁸

Argument

I. The Commission has no authority to “waive” violations of the regulations prescribed under the TCPA in a private right of action.

Numerous commenters in these proceedings have argued that the TCPA creates a private right of action to sue for “a violation of this subsection or the regulations prescribed under this subsection”⁹ and gives the Commission no power to “waive” that right. Plaintiffs incorporate those arguments by reference.¹⁰

⁷ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338, 2015 WL 8543949 ¶¶ 20–21 (CGAB Dec. 9, 2015) (“December 9, 2015 Bureau Order”).

⁸ *In re Rules & Regulations Implementing the Tel. Consumer Prot. Act of 1991*, CG Docket Nos. 02-278, 05-338 (CGAB Nov. 2, 2016).

⁹ 47 U.S.C. § 227(b)(3).

¹⁰ *See, e.g.*, TCPA Pls.’ Comments on Petitions Concerning the Commission’s Rule on Opt-Out Notices on Fax Advertisements, CG Docket Nos. 02-278, 05-338 at 20–23 (Feb. 14, 2014); TCPA Pls.’ Reply Comments at 3–6 (Feb. 21, 2014); TCPA Pls.’ Comments on Stericycle, Inc. Petition at 6–7 (July 11, 2014); TCPA Pls.’ Comments on American Caresource Petition at 1–3 (Aug. 8, 2014); TCPA Pls.’ Comments on Unique Vacations, Inc. Petition at 6–8 (Sept. 12, 2014); Beck Simmons LLC’s Comments on Francotyp-Postalia Petition at 2, n.6 (Nov. 18, 2014); Physicians Healthsource, Inc.’s Comments on Allscripts Petition at 2, n.6 (Nov. 18, 2014); TCPA Pls.’ Comments on Petitions by Alma Lasers, ASD Specialty Healthcare, Den-Mat Holdings, and Stryker Corp. at 23–31 (Dec. 12, 2014); TCPA Pls.’ Comments on Petitions by EatStreet Inc., McKesson Corp., Philadelphia Consolidated Holding Corp., St. Luke’s Center for Diagnostic Imaging, LLC, Sunwing Vacations, Inc., and ZocDoc, Inc. at 19–22 (Jan. 13, 2015); Physicians Healthsource, Inc.’s Comments on A-S Medication Solutions LLC’s Petition at 9–13 (Feb. 13, 2015); Christopher Lowe Hicklin, DC, PLC’s Comments on National Pen Petition at 7–11 (Mar. 13, 2015); TCPA Pls.’ Comments on Petitions by Boehringer Pharmaceuticals and Esaote North America at 10–14 (Apr. 10, 2015); TCPA Pls.’ Comments on Thirty-One Petitions Filed on or Before April 30, 2015 at 5–8 (May 22, 2015); TCPA Pls.’ Comments on Endo Pharms. Petition at 9–13 (June 12, 2015); TCPA Pls.’ Comments on Petitions by athenahealth, Inc. & Ohio Nat’l Mut., Inc. at 5–9 (Sept. 11, 2015); Wilder Chiropractic, Inc.’s Comments on Scrip Inc. Petition at 4–7 (Oct. 9, 2015); Shaun Fauley’s Comments on Petitions by Virbac Corp. and Petplan at 4–8 (Dec. 18, 2015); TCPA Pls.’ Comments on Petitions for Retroactive Waiver

In addition, Plaintiff reiterates that there is no “historical precedent” for the Commission to retroactively “waive” a party’s statutory liability in a private TCPA action, and this action represents “a gross departure from settled historical practice” in violation of the separation of powers,¹¹ as well as a violation of Plaintiff’s due-process rights by attempting to retroactively “interpret” away a vested, statutory cause of action.¹²

II. Petitioner failed to “make every effort” to file by April 30, 2015.

As of the filing of these comments, the Commission has not yet denied a waiver request for failure to “make every effort” to file by April 30, 2015. The current Petition should be denied on this basis because Safemark provides no reason why it could not file by the deadline.

In general, where a petitioner seeking relief from the Commission had “ample time” to comply with a deadline and “offers no reason for its failure to do so,” the Commission will deny the relief.¹³ Safemark had ample time to file a petition by April 30, 2015, and it offers no reason for its failure to do so.¹⁴ Safemark does not, for example, claim that it tried to file by that date but was somehow forced to wait until

filed by C. Specialites, Inc and Legal & General America, Inc., CG Docket Nos. 02-278, 05-338 at 3 (May 13, 2016).

¹¹ *PHH Corp. v. Consumer Fin. Prot. Bureau*, --- F.3d ---, No. 15-1177, 2016 WL 5898801, at *3 (D.C. Cir. Oct. 11, 2016).

¹² *Id.* at *33–36.

¹³ *In re Atlanta Channel, Inc.*, 27 FCC Rcd. 14541, 14545-46, ¶ 9 (rel. Nov. 9, 2012) (denying request to waive filing deadline).

¹⁴ Safemark Pet. at 1–10.

October 2016.¹⁵ A petitioner filing more than a year after a deadline should be required to provide some explanation for why it could not comply, and the Commission should deny the petition on this basis alone.

Safemark may argue that it could not be expected to seek a waiver until after it was sued, but it should make no difference for deciding the timeliness of a waiver petition when or even *if* a petitioner has been sued. Other petitioners complied with the deadline without having been sued. For example, on April 28, 2015, Truckers B2B, LLC, filed a petition explaining it sought a waiver because it was “concerned that it could one day face significant liability” for opt-out-notice violations.¹⁶ On April 29, 2015, Wells Fargo filed a petition explaining it sought a waiver “as a prophylactic measure.”¹⁷ Both petitions were granted.¹⁸ There was nothing preventing Safemark from doing the same, and its petition should be denied as untimely.

III. Petitioner was simply ignorant of the law.

Safemark argues that it “included limited opt-out information” in the fax sent to Plaintiff, but that is incorrect.¹⁹ The fax contains no opt-out notice of any kind.²⁰

¹⁵ *Id.*

¹⁶ *Petition for Waiver by Truckers B2B, LLC*, CG Docket Nos. 02-278, 05-338, at 2 (filed Apr. 28, 2015).

¹⁷ *Petition of Wells Fargo & Co. for Waiver of Section 64.1200(a)(4)(iv) of the Commission’s Rules*, CG Docket Nos. 02-278, 05-338, at 5 (filed Apr. 29, 2015).

¹⁸ August 28, 2015 Bureau Order ¶ 24.

¹⁹ Safemark Pet. at 7.

²⁰ See Exhibit A.

The fax does contain a telephone number and email address, but there is no indication these avenues could be used to opt out of future faxes.²¹ Safemark claims that it “included the telephone number and email address in the faxes that recipients could contact in order to opt out of future faxes,” strictly “[a]s a matter of good business practices,” and not because it had any knowledge that opt-out notice was legally required on *any* fax.²² Since Safemark admits it did not know about the opt-out-notice requirement for faxes sent with prior express invitation or permission, its Petition should be denied.

Conclusion

For the foregoing reasons, the Commission should deny the Petition of Safemark Systems, LP for Retroactive Waiver of C.F.R. § 64.1200(a)(4)(iv).

Dated: November 14, 2016

Respectfully submitted,

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²¹ *Id.*

²² Safemark Pet. at 4.

EXHIBIT A

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Azim Saju, President - HDG Hotels Ocala Florida

Navroz Saju
Howard Johnson Ocala, FL
Revenue generated since installation
in 2006 over \$165,000

Arti Jethwa
Super 8 Jacksonville, FL
80% guest acceptance rate in 2012

Candace McComsey
Wyndham Beach Oceanfront Virginia Beach, VA
Averaged \$11.56 per safe per month in 2012

Bill Patel
Super 8 Cleveland, TN
Averaged \$7.07 per safe per month in 2012

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